

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEPHEN J. PERCER,

 PETITIONER,

 v.

DOUG WADDINGTON,

 RESPONDENT.

NO. CV-04-5100-EFS

**ORDER DISMISSING PETITION
UNDER 28 U.S.C. § 2254 FOR
WRIT OF HABEAS CORPUS BY
PERSON IN STATE CUSTODY**

BEFORE THE COURT, without oral argument, is Petitioner Stephen J. Percer's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by Person in State Custody ("Petition") (Ct. Rec. 4). Mr. Percer appears *pro se*. While Respondent Doug Waddington is represented by Assistant Washington Attorney General John H. Samson. The Court has reviewed all submitted materials and is fully informed on the issues raised by the parties.

I. Background

On February 12, 1996, in Kittitas County Superior Court, Mr. Percer pled guilty to the following Washington crimes: (1) vehicular homicide, (2) taking a motor vehicle without owner's permission, (3) first degree theft, and (4) hit and run. (Ct. Rec. 9 at Ex. 1.) Four days later, Mr. Percer was convicted of felony murder in the second degree ("felony

1 murder conviction") following a bench trial. *Id.* As a result of these
2 crimes, Mr. Percer was sentenced to 288 months imprisonment. *Id.* Mr.
3 Percer's felony murder conviction was affirmed by the Washington Court
4 of Appeals on October 14, 1997. *Id.* at Ex. 2. The Washington Supreme
5 Court then denied Mr. Percer's Petition for Review of the Court of
6 Appeals' decision on April 1, 1998. *Id.* at Ex. 5.

7 On December 21, 1999, while serving his sentence, Mr. Percer signed
8 and subsequently filed a document titled "Petition of Writ of Habeas
9 Corpus and Memorandum in Support of Petition" with the Washington Supreme
10 Court. *Id.* at Ex. 6. In this petition, Mr. Percer requested "habeas
11 relief from his confinement in Crowley County, Colorado[,] " where Mr.
12 Percer was serving his Washington sentence on agreement between
13 Washington and Colorado authorizes. *Id.* Mr. Percer believed it was
14 unlawful for Washington to house him outside the state's boundaries. *Id.*
15 On January 4, 2000, this petition was construed by the Washington Supreme
16 Court as a personal restraint petition ("Personal Restraint Petition No.
17 1"), *id.* at Ex. 7, and later dismissed on March 6, 2001, *id.* at Ex. 8.
18 The Washington Supreme Court's dismissal of Personal Restraint Petition
19 No. 1 was declared final on May 18, 2001. *Id.* at Ex. 9.

20 On May 31, 2001, Mr. Percer filed a document titled "Personal
21 Restraint Petition" ("Personal Restraint Petition No. 2") with the
22 Washington Court of Appeals. *Id.* at 10. In this petition, Mr. Percer
23 asked the Washington Court of Appeals to vacate his felony murder
24 conviction on the ground it was unconstitutional under the Constitution's
25 double jeopardy clause ("Double Jeopardy Claim"). *Id.* at Ex. 11. On May
26 21, 2002, based on Mr. Percer's Double Jeopardy Claim, the Washington

1 Court of Appeals granted Personal Restraint Petition No. 2 by vacating
2 Mr. Percer's felony murder conviction and remanding his case for
3 resentencing. *In re Percer*, 111 Wash. App. 843, 850 (2002), *rev'd*, 150
4 Wash. 2d 41 (2003). However, the Washington Court of Appeals' decision
5 was reversed on August 21, 2003, by the Washington Supreme Court. *In re*
6 *Percer*, 150 Wash. 2d 41, 54-55 (2003).

7 In July 2004, Mr. Percer initiated the instant habeas proceedings
8 by filing a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus
9 ("July Petition") by Person in State Custody in the Western District of
10 Washington. (Ct. Rec. 2.) Because Mr. Percer is challenging a criminal
11 judgment entered by a superior court located in Eastern Washington, Mr.
12 Percer's case was transferred to the Eastern District of Washington. (Ct.
13 Rec. 1.) Upon receiving and reviewing his July Petition, the Court
14 Ordered Mr. Percer to file an amended petition that named a correct
15 Respondent.¹ Mr. Percer filed a new Petition Under 28 U.S.C. § 2254 for
16 Writ of Habeas Corpus by Person in State Custody on November 17, 2004.
17 (Ct. Rec. 4.) In his Petition, Mr. Percer reasserts the Double Jeopardy
18 Claim raised in Personal Restraint Petition No. 2. *Id.*

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22 ¹ The July Petition listed "State of Washington" as Respondent. Mr.
23 Percer's listing was deficient because a petitioner seeking habeas corpus
24 relief under § 2254 must name the state officer having custody over him
25 or her as the respondent to his or her petition. Rule 2(a) of the RULES
26 GOVERNING SECTION 2254 CASES IN THE U.S. DIST. COURTS.

II. Analysis

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides:²

(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of the State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

A. Direct Review: § 2244(d) (1) (A)

A criminal judgment becomes final at the conclusion of its direct appellate review or the expiration of the time for seeking such review. *Id.* § 2244(d) (1) (A). The time period for seeking direct review under §

² Before the merits of the Petition are considered, the Court must determine whether it was timely filed.

1 2244(d) (1) (A) "includes the period within which a petitioner can file a
2 petition for a writ of *certiorari* from the United States Supreme Court,
3 whether or not the petitioner actually files such a petition." *Bowen v.*
4 *Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). Thus, after direct review
5 relief is denied by a state supreme court, if a petition for a writ of
6 *certiorari* is not filed, a petitioner's § 2254 statute of limitations
7 accrual date commences ninety days after the state supreme court's "entry
8 of the order denying discretionary review." *Id.*; SUP. CT. R. 13(1).

9 Here, Mr. Percer was denied direct review relief on the appeal of
10 his felony murder conviction by the Washington Supreme Court on April
11 4, 1998. Therefore, because Mr. Percer did not file a petition for a
12 writ of *certiorari* from the United States Supreme Court, his judgment
13 became final on June 30, 1998, ninety days following the Washington
14 Supreme Court's denial of his Petition for Review (Ct. Rec. 9 at Ex. 5).
15 Accordingly, Mr. Percer's Petition is untimely under § 2244(d) (1) (A)
16 because it was not filed until July 2004, a date more than one-year after
17 the date on which his judgment became final. *Nino v. Galaza*, 183 F.3d
18 1003 (9th Cir. 1999).

19 **B. Impediments to Filing, Newly Recognized Constitutional Rights, and/or**
20 **Newly Discovered Evidence: § 2244(d) (1) (B) - (D)**

21 Because nothing in the record suggests (1) Mr. Percer was impeded
22 by state action from filing his Petition, (2) Mr. Percer's Petition is
23 based on a constitutional right recognized by the United States Supreme
24 Court after June 30, 1999, or (3) Mr. Percer's habeas claim is based on
25 evidence discovered after June 30, 1999, the Court concludes Mr. Percer's
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1 one-year statute of limitation for filing a § 2254 petition began on June
2 30, 1999, in accordance with § 2244(d)(1)(A).

3 **C. Post-Conviction Review: § 2244(d)(2)**

4 Mr. Percer's arguments that his § 2254 statute of limitation was
5 tolled under § 2244(d)(2) while his Personal Restraint Petitions were
6 pending in state court are irrelevant because Mr. Percer's one-year
7 deadline for filing a § 2254 petition had already run prior to his filing
8 of either of the Personal Restraint Petitions.³ As noted above, Mr.
9 Percer's judgment became final on June 30, 1998, which was more than one-
10 year before Mr. Percer filed his Personal Restraint Petitions (No.1:
11 December 27, 1999; No. 2: May 31, 2001). Accordingly, even if these time
12 periods were tolled under § 2244(d)(2), Mr. Percer's Petition is
13 nonetheless untimely under AEDPA's one-year statute of limitations.

14 **D. Equitable Tolling**

15 Section 2254's one-year statute of limitation may be tolled when
16 "extraordinary circumstances beyond a prisoner's control make it
17 impossible to file a petition on time" and "the extraordinary
18 circumstances were the cause of his untimeliness." *Spitsyn v. Moore*, 345
19 F.3d 796, 799 (9th Cir. 2003) (internal quotation marks and citation
20 omitted). Usually, a petitioner "seeking equitable tolling bears the
21 burden of establishing two elements: (1) that he has been pursuing his

23 ³ The Court expresses no opinion on whether Personal Restraint
24 Petition No. 1, which did not raise Mr. Percer's Double Jeopardy Claim,
25 could effectively toll the § 2254 statute of limitation under §
26 2244(d)(2) had it been filed prior to June 30, 1999.

1 rights diligently, and (2) that some extraordinary circumstance stood in
2 his way." *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1814 (2005).

3 In his Reply to Respondent's Response, Mr. Percer expresses his
4 belief he is entitled to equitable tolling. (Ct. Rec. 10.) However, Mr.
5 Percer provides no basis for the belief. Instead, Mr. Percer merely
6 asserts that an application of § 2254's one-year statute of limitation
7 would be "unfair." *Id.* at 6. This is insufficient. Accordingly, because
8 Mr. Percer failed to demonstrate (1) he diligently pursued his
9 constitutional rights and (2) that some extraordinary circumstance
10 prohibited him from seeking habeas relief, and nothing in the record
11 suggests his claims should be equitable tolled, the Court denies Mr.
12 Percer's request for equitably tolling relief.

13 III. Conclusion

14 Because Mr. Percer's judgment became final on June 30, 1998, his
15 Petition was not filed prior to one year thereafter, and there is no
16 basis for tolling § 2254's statute of limitations, Mr. Percer's Petition
17 is dismissed as untimely under § 2244(d).

18 Accordingly, **IT IS HEREBY ORDERED:** Petitioner Stephen J. Percer's
19 Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by Person in
20 State Custody (Ct. Rec. 4) is **DISMISSED**. The Clerk's Office shall **ENTER**
21 **JUDGMENT** dismissing Petitioner's Claims.

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1 **IT IS SO ORDERED.** The District Court Executive is directed to enter
2 this Order and judgment, provide copies of this Order to Petitioner and
3 counsel for the Respondent, and **CLOSE THIS FILE.**

4 **DATED** this 22nd day of February, 2006.

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6 /s/Edward F. Shea
 EDWARD F. SHEA
7 United States District Judge

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